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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
)
WESTERN WIRELESS CORPORATION)
)
Petition For Designation as an)
Eligible Telecommunications Carrier And)
For Related Waivers To Provide Universal)
Service To The Crow Reservation in)
Montana)

CC Docket No. 96-45

INITIAL COMMENTS OF U S WEST COMMUNICATIONS, INC.

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And For Related Waivers To Provide)	
Universal Service To The Crow)	
Reservation in Montana)	

INITIAL COMMENTS OF U S WEST COMMUNICATIONS, INC.

I. INTRODUCTION AND SUMMARY

Western Wireless Corporation ("WWC") has requested that the Federal Communications Commission ("FCC") grant it eligible telecommunications carrier ("ETC") status regarding an area loosely described as the Crow Reservation and that it also grant it waivers that would entitle it to more federal support than other ETCs serving the Crow Reservation regardless of wireless cost of service on the Crow Reservation and which would also provide WWC with federal support more quickly than its peers.

For a number of reasons, the Petition should be dismissed. First, WWC has not established, as it must that the Montana Public Service Commission ("Montana PSC") lacks jurisdiction over this Petition. Second, the waivers requested do not pass the two-pronged test of special circumstances and public interest because WWC has not shown any relevant circumstances unique to it, and the waivers will merely discriminate unlawfully in favor of WWC. What

WWC has described -- the unique economic hardships faced on the Crow Reservation -- should be addressed separately in the FCC's recent notices of proposed rulemakings regarding wireless carriers, tribal lands and universal service, but not in the context of a waiver request by a single company. Finally, WWC has failed to establish that it is entitled to ETC status on the merits.

II. WWC HAS FAILED TO ESTABLISH THAT MONTANA LACKS JURISDICTION

WWC recognized, as it must, that it bears the burden under Section 214(e)(6) to establish that the Montana PSC lacks jurisdiction over this Petition.¹ WWC nevertheless has utterly failed to meet this burden.

WWC argued that the Montana PSC lacks jurisdiction because its proposed service area includes the Crow Reservation.² This is insufficient to establish that the Montana PSC lacks jurisdiction. If this were sufficient, it would cause a major revolution in the jurisdiction of states over reservation

¹ Petition at 1 n.2. See Public Notice, Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, 12 FCC Rcd. 22947 (1997) ("FCC Procedures"). In the Matter of Petition of Saddleback Communications for Designation as an Eligible Telecommunications Carrier Pursuant to Section 214(e)(6) of the Communications Act, Memorandum Opinion and Order, 13 FCC Rcd. 22433 (1998) ("Saddleback"), cited by WWC, is eminently distinguishable from the case at bar. In Saddleback, the petitioner was a division of an Indian tribe providing service within tribal lands. Id. at 22435 ¶ 4. In addition, the state commission submitted a letter stating it lacked jurisdiction, and no party challenged jurisdiction. Id. at 22435-36 ¶ 7. Here, WWC operates in many non-tribal areas; it is not a division of a tribe, nor is it in any way affiliated with a tribe; the Montana PSC has not found that it lacks jurisdiction; and U S WEST is challenging FCC jurisdiction. Therefore, Saddleback does not apply here.

lands because states -- including without limitation Montana -- commonly exercise regulatory authority over businesses serving reservation lands. For example, the Montana PSC previously granted ETC status to U S WEST Communications, Inc. ("U S WEST") and Project Telephone Company ("Project") for the Crow Reservation. Moreover, WWC itself recently received an oral, "conditional," "preliminary approval" from Minnesota of its application for ETC status which covered reservation lands. As far as we know, WWC does not intend to challenge that determination on jurisdictional grounds. Indeed, WWC initially sought ETC status on the Crow Reservation through the Montana PSC, not the FCC, and the Montana PSC has not found that it lacks jurisdiction.

Nonetheless, WWC has now decided that it likes the FCC better than the Montana PSC, but Section 214(e)(6) was not intended to give carriers a choice of commissions, i.e., to encourage forum shopping. Rather, it quite clearly gives petitioners only one forum: the state, unless the state lacks jurisdiction; in which case, jurisdiction lies with the FCC. WWC has not established that the Montana PSC lacks jurisdiction; therefore, the FCC lacks jurisdiction.³

² Petition at 8 n.12. Cf. Petition at 14 n.26.

³ Montana v. United States, 450 U.S. 544 (1980), quoted in the Petition at 8 n.14, does not pertain to the case at bar. In Montana, the Court made two holdings, neither of which affects this case: (1) the bed of the Big Horn River belonged to the state of Montana; and (2) the Crow Nation lacked the authority to regulate non-Indian hunting and fishing on reservation land owned in fee by nonmembers of the tribe.

Furthermore, Section 332(c)(3)(A) also does not rob Montana of jurisdiction over this Petition. As noted by WWC, that statute preempts rate and entry regulation only. Petition at 8. The rate and entry preemption is not interpreted

III. THE WAIVERS ARE ANTICOMPETITIVE, DISCRIMINATORY AND UNLAWFUL

WWC has asked for the following types of special treatment for itself:

- A benchmark of \$10 (the FCC is currently proposing a benchmark of somewhere between \$23.01 and \$30.02⁴ of the national average cost, which is approximately \$20.01);
- The use of a cost model designed to give only wireline costs, not wireless costs;
- The payment by the federal fund of the full amount of support including the portion that otherwise would be allocated to Montana; and
- Exemption from Rule 307,⁵ which provides for competitive neutrality and portability of support as well as reporting and collection requirements for non-ILEC ETCs.

The test for such waivers, as noted by WWC, has two requirements: special circumstances and public interest. None of the above waivers meet either precondition for a waiver. Indeed, the only effect of each waiver is to favor WWC above other carriers through regulatory disparity, which violates the FCC's self-imposed universal service principle of competitive and technological neutrality.

A. There Are No Special Circumstances

WWC claims that its allegations regarding a 45% penetration rate,⁶ 85% unemployment rate and \$4,243 per capita income⁷ on the Crow Reservation

broadly and making a determination of ETC status does not constitute rate or entry regulation. See Texas Office of Public Util. Counsel v. FCC, 1999 U.S. App. LEXIS 17941, *88-89 (5th Cir. 1999) ("Texas OPUC").

⁴ These numbers represent 115% and 150%, respectively.

⁵ 47 C.F.R. § 54.307.

justifies special treatment for WWC as an ETC there. WWC misses the point. The special circumstances have to be that of the carrier requesting the waiver, not of the service area, especially when there are other ETCs in the service area (as there are here). In other words, WWC had to demonstrate that it is different from U S WEST, Project and Range and that such difference merits the special treatment it has requested. WWC did not even attempt to do this. It merely noted the characteristics of the Crow Reservation. If these characteristics merit special treatment, then the FCC should deal with such issues in the pending rulemakings it has with regard to universal service, wireless carriers and tribal lands.⁸ Thus, the waivers should be denied.

⁶ This number represents the percentage of homes actually purchasing service, not the number of homes passed by facilities. Notwithstanding the fact that the accuracy of this number is subject to question (one of which is that it comes from the 1990 census; in other words, it is nearly 10 years old), this number is not the relevant one. The relevant number is the percentage of homes passed by facilities. If this number (which has not been provided) is relatively high, but the subscribership rate is low, then adding another ETC will have little effect. The problem is not one of a lack of availability, it is a problem of poverty that should be addressed through Lifeline and Linkup.

⁷ The unemployment rate was misquoted; the cited document reported a 44% unemployment rate based apparently on 1990 census figures (which obviously is still extremely high and indicative of substantial poverty). See Exhibit A. The per capita income figure pertains to 1989; however, it too indicates serious poverty. Once again, the issue of poverty (as distinguished from high cost) is an issue for Lifeline and Linkup, not an issue relevant to the need for an additional ETC.

⁸ In the Matter of Federal-State Joint Board on Universal Service: Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Further Notice of Proposed Rulemaking, CC Docket 96-45, FCC 99-204, rel. Sep. 3, 1999; In the Matter of Extending Wireless Telecommunications Service to Tribal Lands, Notice of Proposed Rulemaking, WT Docket No. 99-266, FCC 99-205, rel. Aug. 18, 1999.

B. The Waivers Would Have A Net Negative Impact
On The Public Interest And Competition

Boiled down to their essence, the waivers simply amount to special subsidies and regulatory dispensation to WWC that is not available to its competitors who have been serving the Crow Reservation and waiting for universal service support for years. First, the \$10 benchmark would provide WWC with \$13 more support per line than the other Crow Reservation ETCs, assuming the FCC approves the proposed 115% benchmark.⁹ Second, the use of a wireline cost model would yield the possibility of a further windfall as well if wireless costs are less than wireline for a given support area.¹⁰ Third, the payment of the state portion of support by the federal fund to WWC would again yield a windfall to WWC not available to its Crow Reservation competitors because Montana does not yet have a fund in place to support intrastate service in Montana.¹¹ Finally, WWC's proposed exemption from Rule 307 would

⁹ Moreover, the \$10 benchmark is obviously too low for a high cost fund. The high cost fund should be triggered by an affordability benchmark geared to the populace at large, not an impoverished subsection. The increased needs of the impoverished are to be taken care of by additional aid through Lifeline and Linkup.

¹⁰ WWC has, in other dockets, asserted that wireless has lower costs than wireline in high cost rural areas. Thus, assume a \$26 benchmark (130% of the national average cost), a wireline cost model result of \$40 and a \$30 wireless cost. WWC's proposed waiver would allow it to recover \$40 total on that customer, \$10 more than its cost. However, a wireline ETC would recover only its forward-looking cost and no profit. This turns the universal service fund into a profit center, but only for WWC. This, obviously, is contrary to the goals of universal service.

¹¹ Thus, assume a \$26 benchmark, a \$30 cost model result and a \$2 state share. WWC would receive \$4 for serving the customer, and its competitors would receive only \$2 for the same customer.

free it from the principles of competitive neutrality and portability¹² as well as give it support much faster than any other non-ILEC ETC.

WWC urged that the waivers should be granted because they will increase competition on the Crow Reservation. In fact, WWC claimed at least four times that, without the waivers, it will not be able to provide universal service.¹³ What this means is that WWC cannot enter without subsidies in excess to those available to its competitors.¹⁴ In other words, WWC has stated it is less efficient than its Crow Reservation competitors. Regulation that promotes inefficient entry, although it increases the number of competitors, does not increase competition or social welfare. Instead, it allows less efficient firms to compete with and perhaps triumph over more efficient competitors. Thus, it encourages investment in relatively inefficient capacity, firms and technologies and may even result in the exit of relatively more efficient firms. Consequently, the waivers are anticompetitive, will harm the public interest and should be denied.¹⁵

¹² Rule 307 provides that additional ETCs receive the same amount of support for a given line as would the incumbent ETC.

¹³ Petition at 9 n.16, 17, 19, 23.

¹⁴ Project receives \$20.69 per line of federal support per month. This amount is available to WWC if it gains ETC status.

¹⁵ With all due respect, the Joint Statement of Interest of WWC and the Crow Tribal Council does not change this conclusion. It includes no actual facts regarding the public interest; it simply states that the Crow Tribal Council “supports Western Wireless’ universal service efforts.” Moreover, it appears that one contributing reason for the Council’s support is the potential for new jobs, which is not a proper universal service public interest criteria.

C. The Waivers Violate The Principle Of Competitive Neutrality

The waivers have been described above and it is now manifest that they would treat WWC more favorably than the other Crow Reservation ETCs without legitimate reason. This violates the FCC's universal service principle of competitive neutrality:

Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.¹⁶

Because the waivers would unfairly advantage WWC and wireless technology, the waivers must be denied.

IV. WWC HAS NOT ESTABLISHED IT SATISFIES THE ETC CRITERIA

U S WEST welcomes all legitimate ETC candidates who wish to aid in supplying universal service in Montana. Furthermore, it agrees that wireless carriers are not per se ineligible. U S WEST also agrees that the Crow Reservation may present a case of compelling need. However, wireless candidates must be willing and able to shoulder the same burdens as wireline ETCs in order to claim the benefits of USF support. WWC has failed to show it willing or able to shoulder the universal service burden on the Crow Reservation.

The Petition demonstrates that WWC does not presently offer and advertise a universal service package throughout the Crow Reservation.

¹⁶ In the Matter of Federal-State Joint Board on Universal Service, Report and Order, 12 FCC Rcd. 8776, 8801 ¶ 47 (1997).

Failure to meet this Section 214(e)(1) requirement requires that the Petition be denied. Moreover, the Petition lacks sufficient information on the following necessary elements of ETC status:

- Whether WWC can financially handle the burdens of offering and advertising throughout its proposed service area,
- Whether the Petition is in the public interest,
- Whether WWC is adequate as the sole ETC,
- Whether the universal service offerings are affordable, and
- Whether the Petition is competitively neutral.

A. WWC Has Admitted That It Does Not Offer And Advertise A Universal Service Package Throughout The Crow Reservation

The first fatal deficiency of the Petition on the ETC merits is the undisputed fact that WWC does not currently offer and advertise a basic universal service package throughout the Crow Reservation as required by Congress and the FCC.¹⁷ Both Section 214(e)(1) and FCC regulations state that, prior to being designated an ETC, a carrier “shall” offer each of the supported services throughout the service area.¹⁸ 47 C.F.R. § 54.101(b). WWC interprets “shall” as “shall intend to.” Congress, however, made its disagreement with WWC’s position clear in Section 214(e)(2): “the State commission . . . shall . . . designate more than one common carrier as an eligible telecommunications carrier . . . , so long as each additional requesting

¹⁷ WWC merely states that it will offer and advertise a universal service offering throughout the Crow Reservation.

¹⁸ WWC must also demonstrate that it offers Lifeline as well, but its Petition fails on this point as well. 47 C.F.R. § 54.405.

carrier meets the requirements of paragraph (1).” (Emphasis added.) If Congress intended carriers to be able to obtain ETC status based solely on their intent to meet the strictures of Section 214(e)(1), then it would have said so. Instead, it used the present tense (“meets”), and it made clear that Section 214(e)(1) contains “requirements” for ETC status, not mere aspirations, as WWC would have it.

The FCC has also interpreted “shall” as “must,” which of course is the usual statutory meaning of the term:

Requirement to offer all designated services. An eligible telecommunications carrier must offer each of the services set forth in paragraph (a) of this section in order to receive federal universal service support.¹⁹

Later, when it established its procedures for ETC applications, it spelled out clearly that the applicant must show in its application that it presently offers and advertises:

[C]arriers seeking designation . . . are instructed to file a petition that sets forth the following information: . . .

2. A certification that the petitioner provides all services designated for support . . . ; . . .
3. A certification that the petitioner offers the supported services[; and]
4. A description of how the petitioner “advertise[s]. . . the [supported] services. . . .”²⁰

Also, in its Seventh Report and Order, the FCC again used the present tense: “All carriers . . . that provide the supported services . . . are eligible for ETC

¹⁹ 47 C.F.R. § 54.101(b) (italics in original; underlining added).

status. . . .”²¹ Moreover, in Saddleback, a case relied on by WWC, the CCB held that “to be designated ETC a common carrier must, throughout its service area: (1) offer all of the services designated . . . and (2) advertise . . . such services. . . .”²² Thus, WWC’s interpretation makes a mockery of the statute, the rules and the underlying intent.²³

²⁰ FCC Procedures (emphasis added).

²¹ In the Matter of Federal State Joint Board on Universal Service, Seventh Report & Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45, Fourth Report & Order in CC Docket No. 96-262 and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 8078, 8113 ¶ 72 (1999); appeal pending sub nom. Vermont PSC v. FCC, No. 99-60530 (5th Cir.).

²² Saddleback, 13 FCC Rcd. at 22436 ¶ 8 (emphasis added).

²³ In the Matter of Designation of Fort Mojave Telecommunications, Inc., et al., as Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act, Memorandum Opinion and Order, 13 FCC Rcd. 4547 (1998) (“Fort Mojave”), cited by WWC, is not to the contrary. Indeed, WWC’s focus on the “will be able to offer” language is out of context and misleading. To provide the proper context, one must observe (as WWC apparently did not) that the same sentence quoted by WWC also states that the ruling was “subject to the extension of time granted above.” Id. at 4553 ¶ 11. The extensions of time pertained to one petitioner’s current inability to provide toll blocking or toll limitation. Id. at 4553 ¶ 10. Because that petitioner had just “recently” commenced service, and its switching equipment could not provide toll blocking or limitation, and it represented it would upgrade its equipment and offer toll limitation in a “short time frame,” the CCB granted the petitioner an extension of time of less than six months to upgrade and offer toll limitation. Id. Thus, the “or will be able to offer” language pertains only to this fact-specific situation in which a petitioner is currently offering all but one of the nine supported services and its ETC status is conditioned on its offering the last service, toll limitation, within a very short timeframe. In the case at bar, WWC does not presently offer its proposed wireless local loop universal service package or any portion of it at all. Nor has it asked for an extension based on technical inability. It simply wants the benefits before the burden, but the statute requires the benefits to follow the burden. Thus, Fort Mojave is of no help to WWC.

Moreover, Fort Mojave confirms what is already known from the FCC Procedures and Saddleback: “to be designated an [ETC]. a common carrier must, throughout its service area: (1) offer all of the services designated . . .

Finally, the Fifth Circuit has also weighed in the meaning of “shall” in its recent decision regarding the FCC’s First Report and Order on universal service, Texas OPUC. In the portion of the opinion granting states the ability to impose additional ETC criteria, the Court clarified the meaning of “shall.”²⁴ The Court found that: “Generally speaking, courts have read ‘shall’ as a more direct statutory command than words such as ‘should’ and ‘may.’”²⁵

Consequently, the word “shall” in Section 214(e)(1) means “must.”²⁶ In turn, WWC must offer and advertise, and it cannot merely intend to offer and advertise. WWC’s mere unenforceable intent to provide supported services in the future is not enough to satisfy ETC requirements.²⁷

and (2) ‘advertise . . . such services.’” Id. at 4548-49 ¶ 2. See also id. at 4551 ¶ 6.

²⁴ Texas OPUC, *39-40 n. 30.

²⁵ Id. Moreover, in a footnote, the Court cited a case “holding that ‘shall’ is ‘the language of command.’” Id. n.30.

²⁶ The South Dakota Commission recently rejected a WWC application because, as here, WWC did not presently have a universal service offering for the Commission to assess. In the Matter of the Filing by GCC License Corporation for Designation as an Eligible Telecommunications Carrier, TC98-146, ¶18 (SDPUC, 5/19/99) (Findings of Fact and Conclusions of Law; Notice of Entry of Order; hereinafter referred to as South Dakota Order; attached hereto as Exhibit B (“South Dakota Order”)). This was the basis of the rejection of WWC’s Oklahoma application by an ALJ as well. Application of GCC License Corporation for Certification as an Eligible Telecommunications Carrier pursuant to the Telecommunications Act of 1996, Cause PUD No. 980000470 (OCC, 5/13/99) (Official Transcript of Proceedings, Oral Ruling of the ALJ; attached hereto as Exhibit C).

²⁷ WWC apparently contends that it is sufficient if WWC presently offers the supported services, but not as a universal service package and not using the same technology and CPE that it intends to offer as its universal service offering. Again, WWC seeks to eviscerate the legitimate requirements of ETC status. Nowhere do the statute or the rules or the cases authorize such a flimsy test. Moreover, such a dilution of ETC requirements would again

B. WWC Does Not Provide Evidence That It Does Or Can Provide A Universal Service Package Throughout The Crow Reservation

Although it is replete with representations of good intent, the Petition provides no evidence that WWC does or can provide universal service throughout the Crow Reservation. As noted, Section 214(e)(1) mandates an applicant to presently offer universal service throughout its intended service area. In other words, ETCs have replaced the now defunct notion of carrier-of-last-resort (“COLR”).²⁸ WWC has not demonstrated that it does or even can live up to this obligation despite the everyday experience of all cellular phone users of service “gaps” or “black holes.” WWC even admits that such black holes or gaps exist on the Crow Reservation by its statement that it will have to file applications to serve areas outside its current Cellular Geographical Service Area (“CGSA”).²⁹ This is not surprising given WWC’s admission that the Crow Reservation is “over 2 million acres of land, comprised primarily of mountain ranges, residual uplands, and alluvial bottoms in an area almost twice the size

eviscerate the underlying intent -- to ensure that ETCs can and do bear the universal service burden prior to receiving USF benefits triggered by ETC status.

²⁸ COLR is a notion deriving from the old regulatory compact whereby local providers accepted the duty to provide affordable service throughout their regions in return for protection of their monopolies. Now, of course, governments wisely have abandoned their side of the deal in favor of a policy to develop competition. That wise move, however, has consequences -- a material breach excuses performance. In other words, the former monopoly providers no longer must provide affordable service throughout their regions absent another regulatory compact. A new, explicit regulatory compact has been put in place by Section 214(e)(1), and it replaces COLR: if one accepts the benefits of ETC status in the form of universal service support, one must provide affordable service throughout the service area on request.

²⁹ Petition at 5 n. 10, 9 n. 16.

of Delaware,” and there “are also numerous small communities [in addition to four main small towns], ranches, and family homes located throughout the reservation, many in extremely remote, hard-to-serve areas.”³⁰ In addition, WWC admitted that it has applied for ETC status in thirteen states.³¹ Finally, WWC admitted that, even with universal service support, it will need several discriminatory waivers in order to be able to provide universal service.³² Given the extreme difficulty of serving the Crow Reservation, WWC’s admitted inability to serve without unlawful waivers and the numerous applications for ETC status previously filed by WWC, it is incumbent upon WWC to show how, financially and technically, it will fill the admitted gaps it has on the Crow Reservation.³³ WWC has previously been denied ETC status for its failure to demonstrate its financial and technical ability to fill gaps.³⁴ The FCC should do the same here.

³⁰ Id. at 3-4.

³¹ Id. at 2 n.4.

³² Id. at 9 n. 16, 17, 19, 23.

³³ The only effort to provide evidence on this point is WWC’s statement that it “currently provides ‘universal service’ to residents of Reese River and Antelope Valley, Nevada, and Regent, North Dakota.” Id. at 6. WWC’s placement of quotation marks around the phrase “universal service” is poignant because as WWC must admit, as it has in other proceedings, that it has failed to gain ETC status for either of these so-called “universal service” offerings. WWC must also admit, again as it has elsewhere, that the Nevada services are heavily subsidized by a fund set up by Nevada Bell. In sum, WWC does not provide “universal service” in Nevada or North Dakota or anywhere else.

³⁴ South Dakota Order ¶¶ 20-22.

C. WWC Has Failed To Establish That Its Universal Service Package Will Be Landline Substitutable

WWC's Petition should be evaluated in terms of the impact on consumers if WWC should become the sole ETC within the Crow Reservation or a portion of it, and WWC has not provided evidence on this topic. The Act, however, gives incumbent ETCs the absolute right to "relinquish" their designations upon the designation of another carrier as an ETC:

A State Commission shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible carrier that seeks to relinquish its eligible carrier designation for an area served by more than one eligible carrier shall give advanced notice to the Commission of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the Commission shall require the remaining eligible carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The Commission shall establish a time, not to exceed one year after the Commission approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.³⁵

The right of relinquishment is undoubtedly a public interest consideration under Section 254(b)(7).³⁶ Even if it were not a factor in the public interest

³⁵ 47 U.S.C. § 214(e)(4) (emphasis added).

³⁶ 47 U.S.C. § 214(e)(1) indisputably mandates the consideration of Section 254 in making all ETC determinations (not just those in areas exclusively served by rural carriers):

A common carrier designated as an eligible telecommunications carrier . . . shall be eligible to receive universal service support in accordance with Section 254 of this title . . .

requirement, landline substitutability is an element the FCC has the discretion to, and should, add to the ETC criteria.³⁷

As Section 214(e)(4) makes clear, if there are multiple ETCs in a service area and one ETC seeks to relinquish its ETC status in that area, the State is required to allow it to withdraw within one year. That withdrawal would place the responsibility for serving the entire area squarely and solely upon the remaining ETC(s). This requires the Commission to evaluate closely WWC's ability to offer supported services if it were to become the sole provider of such services in the service area, i.e., substitutability for wireline service. Because an ETC is required under federal law to provide supported services to any customer who requests it within the designated area, the Commission must of

47 U.S.C. § 214(e) (emphasis added). Moreover, Section 214(e)(2) in relevant part states that:

[C]onsistent with the public interest, convenience, and necessity, the State commission . . . shall, [in the case of a service area not served by a rural carrier], designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1).

(Emphasis added.) The Fifth Circuit has confirmed that public interest is a requirement as to all areas:

The second sentence then confers discretion on the states to designate more than one carrier in rural areas, while requiring them to designate eligible carriers in non-rural areas consistent with the "public interest" requirement.

Texas OPUC at *39-*43, part III.A.2.a. Moreover, because WWC requests a single service area that is served by a rural carrier (Project), public interest is a requirement under any view of Section 214(e)(2).

³⁷ Id. at *40.

necessity evaluate the possibility that the ETC might become the only ETC provider in a particular exchange. This “substitutability” assessment is critical to a full evaluation of an ETC application. The Petition is devoid of evidence of landline substitutability and it must therefore be denied.

D. WWC Has Submitted No Evidence That Its Proposed Universal Service Offering Will Be Affordable

All WWC has stated about the rate of its proposed universal service offering is that it “hopes to be able to provide unlimited local calling in this extremely low-income area for \$10 per month.”³⁸ This is insufficient. The first principle underlying federal universal service reform is that “[q]uality services should be available at just, reasonable and affordable rates.”³⁹ 47 U.S.C. § 254(b)(1) (emphasis added). Thus, the FCC must, and should, review and evaluate the rates of the proposed universal service offerings and determine if they are just, reasonable and affordable. WWC has not provided the FCC with the necessary information to conduct that evaluation; as a result, the FCC must deny the Petition.

³⁸ Petition at 20 (emphasis added). Further, WWC seems to base this hope on its requested \$10 benchmark, not on any presentation of its costs or ability to serve.

³⁹ This portion of the statute is applicable to ETC determinations by virtue of Section 214(e)(1), Section 214(e)(2) and the public interest requirement. See note 36, supra. Moreover, even if it were not an express statutory factor, the FCC can, and should, ensure that it is an ETC criteria under its authority pursuant to Texas OPUC. Finally, Section 332(c)(3)(A) is no barrier to federal regulation of CMRS carriers, and an affordability criteria does not constitute rate regulation in any event. See Texas OPUC at *89.

E. The FCC Should Deny The Petition Based On WWC's Admission That It Will Not Offer An Unadorned Universal Service Package

WWC has admitted that it intends its universal service package to have “enhancements” beyond the requirements of Rule 101.⁴⁰ In other words, it will not offer what the Texas OPUC court termed an “unbundled” package.⁴¹

The FCC has in the past refused to require an unbundled package, and this refusal was recently severely criticized, but narrowly affirmed, in Texas OPUC. However, the Texas OPUC court noted the extreme importance of unbundling to prevent misuse of universal service support through the offering of only luxury packages, thus subsidizing high revenue customers, *i.e.*, cream-skimming or cherry-picking.⁴² The court went so far as to call the FCC's refusal to require unbundling “unreasonable.”⁴³ Moreover, the court had to strain to find a basis to affirm. It called its decision that the FCC's omission met “the minimum level of reasonability required” by the extremely low arbitrary-and-capricious standard of review a “close one.”⁴⁴

Unless an unbundled universal service package is required, there is a great risk that the universal service fund will violate Section 254(e), which provides that a “carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for

⁴⁰ 47 C.F.R. § 54.101. These enhancements include a greatly extended local calling area and mobility.

⁴¹ Texas OPUC at *45-49.

⁴² Id. at *47-49.

⁴³ Id. at *48.

⁴⁴ Id. at *47, 49.

which the support is intended.”⁴⁵ The intent of the statute includes both ubiquitous affordable service and competitive neutrality. If ETCs were allowed to obtain support while offering only ‘luxury’ packages, the USF would become a subsidy for cream-skimming. Wireless ETCs, for example, could refuse to provide affordable basic packages to people of average or less than average means, but still get subsidized on their expensive, luxury offerings with extra features that only affluent customers can afford. Moreover, subsidizing a wireless luxury feature that the carrier makes mandatory, such as greatly expanded local calling areas, is competitively biased against wireline carriers because they can only offer extended area service after obtaining FCC approval.

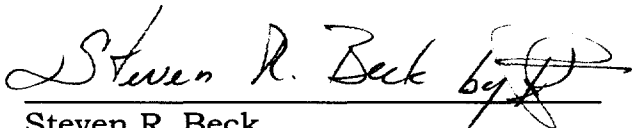
Based on the foregoing, including the reasoning of the Fifth Circuit, U S WEST urges the FCC to reconsider and reverse its past decision not to require an unbundled universal service offering.

⁴⁵ 47 U.S.C. § 254(e).

V. CONCLUSION

For the foregoing reasons, U S WEST urges the FCC to deny the Petition for lack of jurisdiction and for lack of evidence justifying the requested waivers and ETC status.

U S WEST COMMUNICATIONS, INC.

By: 
Steven R. Beck
1020 19th Street, N.W.
Suite 700
Washington, DC 20036
(303) 672-2736

Its Attorney

Of Counsel,
Dan L. Poole

October 12, 1999

Exhibit A

COMMUNITY FACILITIES

The Blackfeet Utilities Commission provides (or contracts) for water, sewer, and other utilities on the reservation. Electricity is furnished by Glacier Cooperative and natural gas by Montana Power Company. With assistance from the IHS, the Blackfeet Utilities Commission recently constructed a new sewage system, which serves the Browning area. Septic tanks are used in more remote regions. Browning has a municipal water system; wells are relied on in most other locations. Telephone service is provided by Three River Telephone Company and Mountain Bell. Five K-12 schools are located in Browning. K-8 students also attend schools in East Glacier, Heart Butte, and Babb. The Blackfeet Community College is located in Browning. The tribe maintains a health clinic in Browning with seven doctors and three dentists, as well as a hospital run by the Indian Health Service and U.S. Public Health Service.

Crow Reservation

Federal reservation
Absarokee (Crow) Indians
Big Horn, Yellowstone, and Treasure counties, Montana

Crow Tribe
Box 159
Crow Agency, Montana 5902
(406) 638-2601
Fax: 638-7283

Total area	2,235,093 acres
Tribally owned	406,935 acres
Allotted	1,209,949 acres
Non-Indian	711,918 acres

High school graduate or higher	69.8%
Bachelor's degree or higher	06.6%
Per capita income (1989)	\$4,243
Total labor force	1,546
Unemployment rate	44.0%

Reservation population	5,783
Tribal enrollment	8,175

LOCATION AND LAND STATUS

The Crow Reservation is located in south-central Montana, south and east of Billings. Its southern border is Wyoming. After treaties were signed in 1825 and 1851 with the U.S. Government, a final treaty in 1860 reduced the reservation to its current size. Allotments were issued to tribal members after the 1887 Allotment Act, and from 1922 until 1962 allotment holders of the reservation sold land mostly along the three rivers which run through it. The tribe has mineral rights to 1.1 million acres near Billings and Hardin, Montana, and near Sheridan, Wyoming.

CULTURE AND HISTORY

The Crow Indians are known to have had their origins prior to the 1300s in the Mississippi headwaters and as far as north as Lake Winnipeg, Canada. They made incremental migrations through North Dakota, first entering Montana in the 1600s. They were part of the Hidatsa, with whom they had a sedentary life, raising crops and hunting buffalo, deer, and elk. But they turned more to hunting, and eventually separated themselves from the Hidatsa and became a nomadic people, with their lives built around the buffalo. They were excellent horsemen and a prosperous people.

In Hidatsa, the Crow are called Absarokee, literally translated, "children of the large beaked bird." White explorers mistook the signing for Absarokee, the flapping of one's hands like the wings of a bird in flight, and just called them Crow.

From their first encounter with Europeans in 1740, probably they have had amiable relations with non-Indian cultures. Treaties with the United States Government were signed as early as 1825, and the treaty of 1880 established their reservation as it is currently defined. In 1869, a famous Crow Chief, Chief Plenty Coups, emerged as a major leader and negotiator with the federal government, and required the Bureau of Indian Affairs to provide education to the people.

While always friendly with the whites, the Crow have maintained their language and traditions intact. Eighty-two percent of Crow tribal members still speak the Crow language. Within the Crow culture the clan is almost as important as the family. A knowledge of the clan system will help one to understand why, for example, in 1984, State Senator Bill Yellowtail sought out his clan uncles and asked them to pass judgment on his political desires before he ran for the office.

GOVERNMENT

The Crow Tribe did not choose to fall under the 1934 Indian Reorganization Act, and they adopted their own constitution in 1948. They have a general council form of government, and all males 21 and over and females 18 and over are members of the Tribal Council. The entire council meets quarterly with 199 members constituting a quorum. In addition to the Council, four officers are elected for two-year terms. They are the chairman, the vice-chairman, the secretary, and the vice-secretary. Several tribal committees assist in the daily operations of law and order, enrollment, education, credit, health, oil and gas, industrial development, land purchase, and recreation. An executive committee coordinates all the committees and establishes the agenda for full Tribal Council meetings.

ECONOMY

Primary sources of income for the tribe are coal, gas and oil leases, agriculture land leases, and the federal government. Less significant sources are timber, fisheries, and hunting.

Since 1920, coal has been mined on the reservation. The eastern part of the reservation contains billions of tons of coal, and the Absloka Mine strips coal from the ceded strip northeast of the reservation. The mine has the capacity to supply eleven million tons of low-sulfur, sub-bituminous coal annually. Oil and gas have been produced on the Crow Reservation since 1930. Tribal lands in 1984 produced nearly 18,000 barrels of oil, and allottee lands produced over 24,000 barrels. In 1985, 20 companies had 709 oil and gas leases.

Most of the almost 1.2 million acres of leased grazing lands, the 150,000 acres leased dry-land farming land, and the nearly 30,000 acres leased irrigated farming land are leased to large non-Indian interests. Allottees lease out most the land.

The United States government is the biggest employer of Crow people. The Bureau of Indian Affairs, with offices at Crow Agency, the Indian Health Service, and the National Park Service are the providers. Limited service businesses exist in the small communities of Lodge Grass, Crow Agency, and Pryor.

INFRASTRUCTURE

A major highway connects Lodge Grass and Crow Agency with Billings, Montana. Secondary roads connect other communities in the sparsely populated area. The tribe has three high schools, one at

Lodge Grass, Pryor, and nearby Hardin. From coal mining revenues, the schools at Hardin and Lodge Grass are two of the wealthiest in the state. Little Bighorn Community College operates at Crow Agency and in the spring of 1985 had 58 full-time equivalent students. Health and dental care are provided at a 34 bed hospital at Crow Agency.

Flathead Reservation

Federal reservation
Salish and Kootenai Tribes
Lake, Sanders, Missoula and Flathead counties, Montana

Confederated Salish and Kootenai Tribes
P. O. Box 278
Pablo, MT 59855
(406) 675-2700
Fax: 675-2806

Total area	1,244,000 acres
Tribally owned	581,906 acres
Allotted/indiv.	45,163 acres
Total labor force	1,643
High school graduate or higher	73.3%
Bachelor's degree or higher	05.5%
Per capita income	\$6,400
Total reservation population	5,128

LOCATION AND LAND STATUS

Situated in western Montana south of Kalispel and north of Missoula, the Flathead Reservation is 60 miles long and 40 miles wide. The towns of Polson, Pablo, Ronan, and St. Ignatius are on the reservation.

CULTURE AND HISTORY

The reservation was founded when representatives of the Salish, the Kootenai and the Pend d'Oreilles Indians signed the 1855 Hellgate Treaty, ceding some 20 million acres of ancestral land to the U.S. government and retaining title over 1.5 million acres as their homeland. In 1904, land parcels within the reservation were allotted to Indians and others; since the 1940s the resident tribes have been buying back reservation lands so that over 51% was tribally owned by the mid-1990s. In 1993, slightly less than half of reservation residents were tribal members.

GOVERNMENT

The Confederated Salish and Kootenai Tribes have a tribal council with a tribal chairperson, an executive treasurer, an executive secretary, and an internal auditor. There are committees for health and human

services, the Job Corps center, the tribal court, law and order, the Head Start program, education, forestry, and natural resources.

AGRICULTURE AND LIVESTOCK

The Confederated Tribes control approximately 400,000 acres of non-irrigated grazing land within the reservation, as well as approximately 15,500 acres of cropland.

CONSTRUCTION

There is a tribally owned construction firm as well as several other construction firms owned by individual Indians in the reservation area.

ECONOMY

The tribe is a highly developed business presence in the region. Tribal land is the dominant source of timber for the region's lumber industry. Tourism facilities, including a large resort, are significant tribal enterprises. Much tribal revenue comes from leasing fees paid by the state of Montana for the tribally owned Kerr Dam, which supplies hydroelectric power. The Confederated Tribes co-manage the Mission Valley Power Electric Utility with the State of Montana, serving over 15,000 commercial and residential customers. The tribal council appoints the utility's five-member board and seven-member consumer group. A tribally owned electronics firm manufactures solid state electronics items, and the tribe also owns a leasing firm and a construction firm. A tribal holding company is the parent company to the tribal marina and resort, the electronics firm, the leasing company and the construction enterprise. The tribe also receives revenue from fishing, hunting, and camping fees. There are approximately 125 non-farm businesses in the region owned by individual Indians.

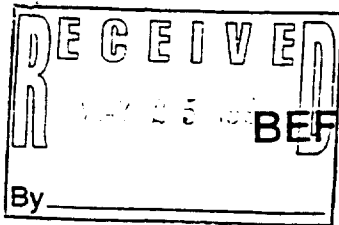
ECONOMIC DEVELOPMENT PROJECTS

The Confederated Tribes are actively engaged in economic development research. Strategies are being developed to deal with the fact that tribal members are largely engulfed by non-Indian economic enterprises within the reservation and in the region, which was experiencing strong economic growth in the mid-1990s. Recognizing that the future of reservation economic growth no longer lies in forestry, agriculture and mining, the Confederated Tribes' strategy is



Located on the South Shore of Flathead Lake, the Resort is Owned by the Tribe

Exhibit B



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE FILING BY GCC)	FINDINGS OF FACT AND
LICENSE CORPORATION FOR DESIGNATION)	CONCLUSIONS OF LAW;
AS AN ELIGIBLE TELECOMMUNICATIONS)	NOTICE OF ENTRY OF
CARRIER)	ORDER
)	TC98-146

MAY 21

On August 25, 1998, the South Dakota Public Utilities Commission (Commission) received a request from GCC License Corporation (GCC) requesting designation as an eligible telecommunications carrier (ETC) for all the exchanges contained within all of the counties in South Dakota.

On August 26, 1998, the Commission electronically transmitted notice of the filing and the intervention deadline of September 11, 1998, to interested individuals and entities. At its September 23, 1998, meeting, the Commission granted intervention to Dakota Telecommunications Group, Inc. (DTG), South Dakota Independent Telephone Coalition (SDITC), and U S WEST Communications, Inc. (U S WEST).

The Commission set the hearing for December 17 and 18, 1998, starting at 9:00 A.M., on December 17, 1998, in Room 412, State Capitol, Pierre, South Dakota. The issue at the hearing was whether GCC should be granted designation as an eligible telecommunications carrier for all the exchanges contained within all of the counties in South Dakota. The hearing was held as scheduled and briefs were filed following the hearing. At its April 26, 1999, meeting, the Commission unanimously voted to deny the application.

Based on the evidence of record, the Commission makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On August 25, 1998, GCC filed an application requesting designation as an ETC for all of the counties within South Dakota. Exhibit 1. GCC's application listed counties it was requesting for ETC status instead of exchanges because it did not know all the exchanges in the state. Tr. at 40. GCC currently provides mobile cellular service in South Dakota. Tr. at 19. GCC uses the trade name of Cellular One. Tr. at 76. GCC is a wholly-owned subsidiary of Western Wireless Corporation (Western Wireless). Tr. at 22.
2. Pursuant to 47 U.S.C. § 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of section 214(e)(1) as an ETC for a service area designated by the Commission. The Commission may designate more than one ETC if the additional requesting carrier meets the requirements of section 214(e)(1). However, before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. 47 U.S.C. §

214(e)(2). GCC is requesting designation as an additional ETC throughout the state. Exhibit 3 at 10. South Dakota exchanges are served by both nonrural and rural telephone companies.

3. Pursuant to 47 U.S.C. § 214(e)(1), a common carrier that is designated as an ETC is eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution.

4. The Federal Communications Commission (FCC) has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equal; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. § 54.101(a).

5. As part of its obligations as an ETC, an ETC is required to make available Lifeline and Link Up services to qualifying low-income consumers. 47 C.F.R. § 54.405; 47 C.F.R. § 54.411.

6. GCC asserts that it currently provides all of the services as designated by the FCC through its existing mobile cellular services. Tr. at 123. Cellular service is generally provisioned as a mobile service. Tr. at 25.

7. Although GCC stated that its existing mobile cellular services currently provide all of the services supported by universal service, GCC intends to offer universal service initially through a fixed wireless offering. Exhibit 4 at 7. GCC specifically stated that it is not seeking universal service funding for the mobile cellular service that it currently provides. Exhibit 3 at 8.

8. GCC states that the Commission can look at the current mobile services it provides to determine whether it meets ETC requirements because GCC would use the same network infrastructure to provision its fixed wireless service. Tr. at 29. The Commission disagrees, and finds that it cannot base its decision on whether to grant ETC status to GCC based on GCC's current mobile cellular service because it is not sufficiently comparable to its proposed fixed wireless system. GCC's own statements support this finding.

9. For example, GCC stated that "[b]ecause GCC's cellular network is designed to serve mobile customers, it would be inappropriate to compare the voice quality using a handheld mobile phone with the voice quality of a fixed wireline service. This is so because GCC's cellular network has been designed to serve mobile customers that may be close to, and in direct line-of-sight of, a transmitter or several miles from, and not in line-of-sight of, a

transmitter. To optimize voice quality for its universal service customers, GCC will construct additional antenna towers, as necessary, and will install fixed wireless network equipment (antennas and transmitters) at customer locations, as it did in Nevada where the Company provides universal service to residential and business customers." Exhibit 4 at 12.

10. Further, GCC conceded that there were currently gaps in coverage but stated that the current mobile service is difficult to compare to a fixed wireless service which will have telephones with greater power plus antennas. Tr. at 99.

11. Thus, the Commission finds that since GCC's universal service offering will be initially based on a fixed wireless system the Commission must look at whether the proposed fixed wireless system meets ETC requirements, not whether the existing mobile cellular service provides all of the services supported by universal service.

12. Even if the Commission could base its decision to grant ETC status on GCC's current provisioning of mobile cellular service, the Commission would be compelled to deny GCC ETC status. First, GCC does not offer a certain amount of free local usage. See 47 C.F.R. § 54.101(a)(2). Under current cellular service the subscriber pays for both incoming and outgoing calls. Tr. at 38. Second, as stated earlier, GCC's mobile cellular service has gaps in coverage that it hoped to fix through the use of a fixed wireless system. Tr. at 99. Therefore, the Commission finds that GCC has failed to show that its current mobile cellular system is able to offer all the services that are supported by federal universal support mechanisms throughout the state.

13. GCC also stated in its prefiled testimony and at the hearing that it intended to deploy personal communications service (PCS) and local multi-point distribution service (LMDS) in South Dakota. Exhibit 4 at 3. GCC initially stated that it holds PCS licenses to serve the entire state of South Dakota. Id. Later it was learned that Western PCS BTA1 License Corporation (Western PCS) owns the radio licenses for PCS in South Dakota. Tr. at 22. Western PCS is an indirect majority-owned subsidiary of Western Wireless. Id. Western PCS has not deployed any PCS systems in South Dakota. Tr. at 27.

14. GCC initially stated that it holds LMDS licenses to serve the entire state of South Dakota. Exhibit 4 at 3. Later it was learned that Eclipse Communications Corporation (Eclipse) owns the radio licenses in South Dakota for LMDS. Tr. at 22. Eclipse is a wholly-owned subsidiary of Western Wireless. Id. In addition, at the hearing, a question was raised as to whether Eclipse had, in fact, received licenses for all of the BTAs in South Dakota. Tr. at 25. Eclipse is in the initial stages of designing and implementing LMDS. Tr. at 27.

15. The Commission finds it is unclear whether GCC intended to offer universal service through PCS or LMDS. However, the Commission finds that if universal service is eventually offered through PCS or LMDS, then Western PCS BTA1 or Eclipse may be the proper companies to apply for ETC status.

16. The Commission finds that it is clear from the record that GCC will initially rely upon a fixed wireless system to offer universal service. Therefore, the Commission shall look at whether the proposed fixed wireless system meets the ETC requirements.

17. GCC does not currently provide fixed wireless loops to any customer in South Dakota. Tr. at 28. GCC has not deployed fixed wireless because there has been no customer demand for the service. Tr. at 101. GCC believed that with a universal service offering, then a customer may want a fixed unit. Id.

18. The Commission finds that since GCC is not actually offering or providing a universal service offering through a fixed wireless system, it must deny GCC's application for ETC status throughout the state. Pursuant to 47 U.S.C. § 214(e)(2), the Commission may designate an additional requesting carrier as an ETC if it "meets the requirements of paragraph (1)." Paragraph one requires an ETC to offer the supported services throughout the area and advertise the availability of such services. GCC is not offering fixed wireless service nor is it advertising the availability of a fixed wireless service throughout South Dakota. Although GCC argues that there is no requirement that a requesting carrier actually offer the services at the time of its application, the plain language of the statute reads otherwise.

19. Moreover, GCC's application clearly demonstrates the reasons why a requesting carrier must actually be offering the supported services before applying for ETC status. The record shows that since GCC is not currently providing services through fixed wireless, it is impossible to determine whether GCC will meet ETC requirements when it actually begins to provide a universal service offering through a fixed wireless system.

20. First, it is unclear whether all customers in the state would be able to use a fixed wireless system if the Commission had granted ETC status to GCC. GCC has applied for ETC status in 13 states and asserted that it would be able to implement universal service immediately if it were designated an ETC. Tr. at 65. However, GCC's current network infrastructure does not serve the entire state. Tr. at 31, 80-81; Exhibit 9. GCC admitted that it could not provide service to every location in South Dakota. Tr. at 99. GCC would have to make changes and improvements to its network infrastructure in order to improve its voice quality for fixed wireless customers. Exhibit 4 at 12. It would need to construct additional cell sites as well as install high gain antennas and network equipment at customer locations. Exhibit 4 at 7-8; Tr. at 109-110. The antennas would either be a small antenna attached to a fixed unit or a permanent antenna on the roof. Tr. at 92.

21. As an example of a fixed wireless offering, GCC noted the provisioning of fixed wireless service in Reese River Valley and Antelope Valley in Nevada and in North Dakota. Exhibit 4 at 8; Tr. at 100. In both of those cases, GCC had to put in extra cell sites to improve its fixed wireless service. Tr. at 99-100. In Nevada, GCC had to construct another cell site in order to give customers improved service because the original fixed wireless system had problems with blocking. Id.

22. Even if the Commission could grant a company ETC status based on intentions to serve, the Commission finds that GCC has failed to show that its proposed fixed wireless system could be offered to customers throughout South Dakota immediately upon being granted ETC status.

23. Second, GCC has not yet finalized what universal service offering it plans to offer to consumers. Exhibit 4 at 13. This lack of a definite plan creates questions as to its ability to offer universal service based on fixed wireless technology throughout the entire state. For example, GCC first stated that it had not set a rate for its universal service offering because GCC would first need to know what forms of subsidies it would receive. Tr. at 33-34, 89, 114. GCC's position was that it was difficult to know whether GCC would price service at \$15.00 a month when it does not know whether it will have access to the same subsidies that are currently received by the incumbent local exchange companies. Tr. at 89. GCC referenced its offering of fixed wireless service in Reese River Valley and Antelope Valley, Nevada where it provided unlimited local usage for a flat monthly rate and stated that in Nevada the subsidies were known so GCC could provide service at that rate because it knew its costs would be covered. Tr. at 34-35. In addition, GCC would need to construct additional cell sites at an average cost of \$200,000 per site. Tr. at 109, 133. GCC stated that it would pay for any necessary antennas. Tr. at 102. GCC asserted that it would provide customer premise equipment and that all of these expenses would be factored into the cost of providing the service. Tr. at 109, 110. The units that are attached to the houses cost approximately \$300 to \$400 per unit. Tr. at 72. However, at the same hearing, GCC also stated it would provide service at a price comparable to that charged by the incumbent local exchange company. Tr. at 95.

24. The Commission finds that GCC's statements on pricing demonstrate the lack of a clear, financial plan to provision fixed wireless service throughout the state. If GCC needs to know what subsidies it may receive before pricing its service to ensure that its costs will be covered, then the Commission does not understand how it can also say that the price of that service will be comparable with that charged by the incumbent local exchange company. GCC did not show to the Commission that it had a viable financial plan to provide fixed wireless service throughout South Dakota.

25. Moreover, GCC's references to its provisioning of fixed wireless service in Reese River Valley and Antelope Valley, Nevada, only strengthens the Commission's concerns as to the viability of GCC's being able to offer a fixed wireless service throughout South Dakota. In Reese River Valley and Antelope Valley, Nevada, customers paid \$13.50 for fixed wireless service. Exhibit 10 at 7. However, this service was highly subsidized. Nevada Bell was billed by GCC for cellular charges that exceeded the flat local rate. *Id.* at 13-14. GCC charged Nevada Bell 37 cents a minute during the day and 25 cents a minute at night for each minute that exceeded the flat monthly rate. *Id.* at 14; Tr. at 70. Nevada Bell also paid for summary billing reports which were estimated to cost approximately \$14,000. Exhibit 10 at 13; Tr. at 69. GCC was also authorized to bill Nevada Bell for non-recurring charges. Exhibit 10 at 15.

26. The Commission finds that if GCC were actually providing a universal service offering throughout the state by the use of a fixed wireless system, then the Commission would know whether there were problems with the provisioning of the service, whether GCC was offering all of the supported services, and whether it was able to offer service to customers throughout the state of South Dakota.

27. Since the Commission finds that GCC is not currently offering the necessary services to support the granting of ETC designation, the Commission need not reach the issue of whether granting ETC status to GCC in areas served by rural telephone companies is in the public interest.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to SDCL Chapters 1-26 and 49-31, including 1-26-18, 1-26-19, 49-31-3, 49-31-7, 49-31-7.1, 49-31-11, and 49-31-78, and 47 U.S.C. § 214(e)(1) through (5).

2. Pursuant to 47 U.S.C. § 214(e)(2), the Commission is required to designate a common carrier that meets the requirements of section 214(e)(1) as an ETC for a service area designated by the Commission. The Commission may designate more than one ETC if the additional requesting carrier meets the requirements of section 214(e)(1). However, before designating an additional ETC for an area served by a rural telephone company, the Commission must find that the designation is in the public interest. 47 U.S.C. § 214(e)(2).

3. Pursuant to 47 U.S.C. § 214(e)(1), a common carrier that is designated as an ETC is eligible to receive universal service support and shall, throughout its service area, offer the services that are supported by federal universal service support mechanisms either using its own facilities or a combination of its own facilities and resale of another carrier's services. The carrier must also advertise the availability of such services and the rates for the services using media of general distribution.

4. The FCC has designated the following services or functionalities as those supported by federal universal service support mechanisms: (1) voice grade access to the public switched network; (2) local usage; (3) dual tone multi-frequency signaling or its functional equal; (4) single party service or its functional equivalent; (5) access to emergency services; (6) access to operator services; (7) access to interexchange service; (8) access to directory assistance; and (9) toll limitation for qualifying low-income consumers. 47 C.F.R. § 54.101(a).

5. As part of its obligations as an ETC, an ETC is required to make available Lifeline and Link Up services to qualifying low-income consumers. 47 C.F.R. § 54.405; 47 C.F.R. § 54.411.

6. The Commission finds that pursuant to 47 U.S.C. § 214(e), an ETC must be actually offering or providing the services supported by the federal universal service support mechanisms throughout the service area before being designated as an ETC. GCC intends to provide a universal service offering initially through a fixed wireless system. However, it does not currently offer fixed wireless service to South Dakota customers. The Commission cannot grant a company ETC status based on intentions to serve.

7. The Commission finds that since it finds that GCC is not currently offering the necessary services to support the granting of ETC designation, it need not reach the issue of whether granting ETC status to GCC in areas served by rural customers is in the public interest.

It is therefore

ORDERED, that GCC's application requesting designation as an ETC for all of the exchanges contained within all of the counties in South Dakota is denied.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 19th day of May, 1999. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 19th day of May, 1999.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: Helaine Kelso

Date: 5/19/99

(OFFICIAL SEAL)

BY ORDER OF THE COMMISSION:

James A. Burg
JAMES A. BURG, Chairman

Pam Nelson
PAM NELSON, Commissioner

Laska Schoenfelder
LASKA SCHOENFELDER, Commissioner

Exhibit C

May-25-99 02:10PM

From: MOSS & BARNETT

612 331 0000

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

APPLICATION OF GCC LICENSE
CORPORATION FOR CERTIFICATION AS
AN ELIGIBLE TELECOMMUNICATIONS
CARRIER PURSUANT TO THE
TELECOMMUNICATIONS ACT OF 1996

} CAUSE NO. NO.
} 980000470

FILED
MAY 13 1999

COURT CLERK'S OFFICE - OKC
CORPORATION COMMISSION
OF OKLAHOMA

TRANSCRIPT OF PROCEEDINGS

ORAL RULING OF THE ALJ

MAY 13, 1999

OFFICIAL REPORTER:

LYNETTE R. WRANY, C.S.R.

OKLAHOMA CORPORATION COMMISSION - OFFICIAL TRANSCRIPT

1W-2

APPEARANCES

No appearances were taken.

STATEMENT OF CAUSE

This Cause FUD 980000470 came on for hearing on the 13th day of May, 1999, before Robert Goldfield, Administrative Law Judge for the Corporation Commission of the State of Oklahoma, for the purpose of hearing giving an oral ruling on the merits and reporting thereon to the Commission.

The cause was called for hearing and the following proceedings were had:

OFFICIAL REPORTER:

LYNETTE E. WHARTY, C.S.R.

OKLAHOMA CORPORATION COMMISSION - OFFICIAL TRANSCRIPT

May-25-88 02:10pm

From-MOSS & BARNETT

+4800

T-827 P.04/06 F-436

1w-3

PROCEEDINGS

THE COURT: Okay. GCC application. Open the record please in FUD 98-470.

I am recommending the application of GCC License Corporation be denied. This Applicant doesn't meet any of the prerequisites necessary to be considered to be designated as an eligible telecommunications carrier for purposes of obtaining universal service support.

The application and testimony are replete with statements of "we will" or "we may in the future" follow some unknown criteria that the applicant failed to divulge in this case. The Applicant's plan, or lack thereof, put so little forward for consideration that not only does the Applicant fail to rise to the level necessary for consideration for designation as an ETC in the rural exchanges, but the Applicant doesn't even rise to the level necessary for consideration in the Southwestern Bell Telephone exchanges.

GCC does not now provide the services that are necessary as a part of the universal service package and cannot even determine if it will offer all of the services that are considered a part of a universal service package.

And, obviously, GCC does not advertise that which it doesn't provide or will provide. In fact, GCC readily admits that it cannot determine the pricing of the

1 lw-4
2 service at this time, which is a primary element of public
3 interest.

4 Further, it is not in the public interest to
5 grant OCC's application when it refuses to accept any of the
6 burdens associated with the ETC designation, such as OCC
7 oversight of quality of service, pricing and consumer
8 complaints and its carrier of last resort obligations.

9 And, finally, I find no evidence presented
10 where the public would benefit from the granting of this
11 application.

12 I'm going to ask that a written report be
13 prepared. I'm going to ask Staff to prepare the procedural
14 history, please. I'm going to ask Mr. Comingdeer's office
15 if you will prepare the findings and recommendations. And
16 each individual party, prepare your summary of your
17 testimony that was presented at the hearing and forward that
18 to Mr. Comingdeer to put in a final draft.

19 And then, Mr. Comingdeer, if you will see
20 that it is circulated, and if everybody agrees to the
21 report, then fine. If not, if there is disagreement, give
22 it either in caps or underline it, the way we do them, and I
23 will make the final decision and language that will go in
24 when the report goes out. Okay?

25 We will close the record on that matter.
Thank you.

1w-5
COUNTY OF OKLAHOMA)
2) ss.
STATE OF OKLAHOMA)
3
4
5
6
7

8 REPORTER'S CERTIFICATE

9 I, LYNETTE H. WRANY, Official Court Reporter within and
10 for the Corporation Commission of the State of Oklahoma, do
11 hereby certify that the above and foregoing is a true and
12 complete transcript of the record made before the
13 Corporation Commission of the State of Oklahoma in Cause
14 Number FUD 980000470, heard on the 13th day of May, 1999.

15 IN WITNESS WHEREOF, I have hereunto set my hand and
16 seal as such Official Court Reporter on this, the 13th day
17 of May, 1999.
18
19
20
21
22

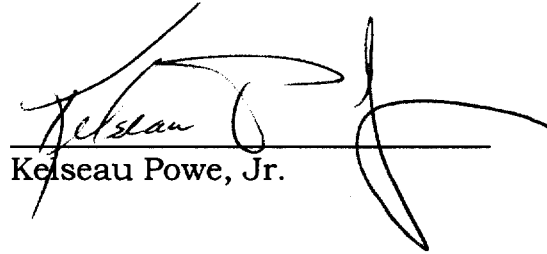
23 Oklahoma)
24) Lyette Wrany
25) Shortland Reporter
26) J. 01167
Exp. Date) ember 31, 2000

Lyette Wrany
LYNETTE H. WRANY, C.S.R.
OFFICIAL COURT REPORTER
OKLAHOMA CORPORATION COMMISSION

OKLAHOMA CORPORATION COMMISSION - OFFICIAL TRANSCRIPT

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on the 12th day of October, 1999, I have caused a copy of the foregoing **INITIAL COMMENTS OF U S WEST COMMUNICATIONS, INC.** to be served, via first class United States mail, postage prepaid, upon the persons listed on the attached service list.



Kelseau Powe, Jr.

*Served via hand delivery

*William E. Kennard
Federal Communications Commission
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Washington, DC 20554

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